No. 94-654

(2)

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

**October Term, 1994**

LORI BOYAR REALBUTO,

*Petitioner,*

*against*

ELIN M. HOWE, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; EDWARD V. REGAN, individually, and as Director of the New York State Department of Audit and Control; JOSEPHINE GAMBINO, individually and as Commissioner of the New York State Department of Civil Service; and THE STATE OF NEW YORK,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## Counterstatement of Question Presented

Whether the court below properly decided this case in accordance with accepted federal law.

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## BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for a writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Second Circuit. The decision of the Court of Appeals is in all respects proper, and does not conflict with any decisions of this Court or any other Circuit Court of Appeals.

### Counterstatement of the Case

The petitioner is a handicapped person, who suffers from impaired hearing and chronic fatigue immune deficiency syndrome (A4).[1] Petitioner originally gained employment with the New York State Office of Mental Retardation and Developmental Disability ("OMRDD") in July, 1974, as a competitive class Mental Hygiene Therapy Aide from an open-competitive eligible list established after competitive examination (A4).[2] Petitioner subsequently received permanent appointments to the competitive class positions of Psychology Assistant II (Grade 14) and Psychology Assistant III (Grade 16) with OMRDD.

On or about March 3, 1979, the petitioner was appointed to the noncompetitive class position of Budget Analyst Trainee in the Division for Youth. Petitioner's appointment was effected through section 55-b of the New York Civil

[1]Unless otherwise noted, numbers in parentheses preceded by the letter "A" are references to the Appendix to the petition.

[2]Under the State's civil service system, employees in the classified service are placed in either the exempt class, the noncompetitive class, the labor class or the competitive class, depending upon the nature of their employment and whether they have taken a competitive civil service examination. *See*, Civil Service Law §§ 40-44.

Service Law, which promotes the employment of physically and mentally handicapped persons by exempting them from the civil service competitive testing process. Section 55-b authorizes the Civil Service Commission to determine up to 1,200 positions to be filled without competitive testing by qualified handicapped persons and directs that such positions be classified in the noncompetitive class. Civil Service Law § 55-b, subd 1. Under New York State's civil service system, the retention and displacement rights of noncompetitive employees, handicapped or nonhandicapped, are contained in § 80-a of the Civil Service Law and are distinctive from the rights of competitive class employees, which are contained in Civil Service Law § 80.

During 1981, the petitioner expressed an interest in transferring from her § 55-b position in the Division for Youth to a Senior Administrative Analyst position in OMRDD (A5). In a letter to the Department of Civil Service dated May 19, 1981, the petitioner posed five questions regarding the contemplated transfer to OMRDD and the effect it would have on her civil service rights vis-a-vis the § 55-b position she already held at the Division for Youth (A5). Among the questions asked was whether the Senior Administrative Analyst position in OMRDD could be reclassified as a § 55-b position (A5). Reclassification of the position was necessary because the petitioner was a permanent noncompetitive class employee and therefore could not transfer to a competitive class position.

In a letter dated May 29, 1981, the Department of Civil Service responded to the petitioner's letter concerning her rights as a noncompetitive § 55-b employee (A5). Among other things, the letter stated that reclassification of the OMRDD Senior Administrative Analyst position under

§ 55-b could be achieved, thus permitting petitioner's appointment to the position without having to take a competitive examination (A5). Petitioner ultimately accepted appointment to the position with OMRDD, which was reclassified as a noncompetitive § 55-b position.

In 1991, due to a budget shortfall, OMRDD was required to engage in a reduction in its workforce (A5). Among the positions eliminated was that of petitioner. OMRDD eliminated both competitive and noncompetitive civil service positions as a part of its reduction in force (A5). A total of 373 OMRDD employees were laid off (A5). Of these, 347 were competitive class employees and 5 were § 55-b employees (A5).[3] Neither the petitioner's status as a § 55-b employee, nor her physical condition, were factors in the decision to eliminate her position. Prior to 1991, OMRDD had not laid off any § 55-b employee as part of a reduction in force.

As is OMRDD's practice in every layoff, OMRDD sought to assist the petitioner (and all laid off employees) in securing alternative employment. OMRDD identified and arranged for comparable alternative employment for the petitioner with the Research Foundation for Mental Hygiene, Inc. (A5). Petitioner initially accepted the new position

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[3]Of the five § 55-b employees affected by the reduction in force, one volunteered for layoff and a second secured employment with the federal government prior to the layoff (JA60). For the remaining § 55-b employees, including petitioner, OMRDD identified and arranged for comparable alternative employment with the Research Foundation for Mental Hygiene, Inc. (JA63, JA100).

Numbers in parentheses preceded by the letters "JA" are to the Joint Appendix in the Court of Appeals.

arranged by OMRDD, but later decided that she was unwilling to take the position (A5).

Thereafter, on or about August 3, 1992, the petitioner commenced this action in the United States District Court, Northern District of New York. It was her contention that because she was hired as a noncompetitive class employee under § 55-b of the Civil Service Law she was not accorded the same displacement rights as employees doing the same job but hired competitively and that this constituted discrimination against her in violation of section 504 of the Rehabilitation Act of 1973 (29 USC § 794), the Americans With Disabilities Act, and the Due Process and Equal Protection clauses of the United States Constitution.

On November 8, 1993 the District Court rendered a memorandum decision and order granting summary judgment to the respondents (A9-A22). The District Court noted that the petitioner began her service with the State as a competitive class employee and that she knew that the position which she sought and accepted with OMRDD in 1981 would be classified as noncompetitive under section 55-b (A10-A11). The District Court rejected petitioner's claim that the respondents discriminated against her by not providing her with the same bumping rights as are accorded competitive class employees. The court ruled that the Rehabilitation Act required the State to provide only "reasonable accommodations" to eliminate existing obstacles to employment of the handicapped, and that permitting the petitioner to take advantage of the bumping rights available to employees in the competitive class would not constitute a "reasonable accommodation", but a "substantial" or "fundamental alteration" in the civil service program (A17-A18).

In the District Court's opinion, the petitioner had not suffered discrimination within the meaning of the Rehabilitation Act because the cause of her unequal benefits was not the fact of her handicapped status, but the fact that she failed to take the competitive examination for her position (A19). The District Court declined to follow the majority opinions in *Allen v Heckler*, 780 F2d 64 (DC Cir 1985), and *Shirey v Devine*, 670 F2d 1188 (DC Cir 1982), finding the dissenting opinions in those cases to be more persuasive (A18). In addition, the District Court rejected petitioner's claims that the State's actions violated her rights under the Equal Protection and Due Process clauses of the United States Constitution (A21-A22).

Petitioner appealed, and by a summary order dated June 3, 1994, the Court of Appeals affirmed (A3-A8). As relevant, the Court of Appeals ruled that petitioner failed to make out a *prima facie* case for a violation of § 504 of the Rehabilitation Act because she failed to prove that respondents discriminated against her "solely by reason of her handicap" (A7). The court noted that the petitioner left a competitive civil service position to avail herself of the "preferential employment opportunities offered to the disabled by § 55-b of the Civil Service Law", and that she knew when she took the position with OMRDD that the position would be reclassified in the noncompetitive class and that she would be accorded the retention rights due all noncompetitive employees (A7). In the opinion of the Court of Appeals, the petitioner's failure to attain competitive class status as a Senior Administrative Analyst, and the attendant displacement rights of a competitive class employee, was not the result of discrimination based upon her handicap, but was the result of her "voluntary and informed decision" to seek appointment to her position through the Civil Service Law

§ 55-b program (A7). The Court of Appeals ruled additionally that because the petitioner was not treated any differently from any other noncompetitive class employee, handicapped or nonhandicapped, it could not hold that the State discriminated against her (A7).

The petitioner subsequently filed a petition for a rehearing containing a suggestion that the action be reheard en banc, which was denied by the Court of Appeals in an order filed on July 13, 1994 (A1-A2). Petitioner now seeks a writ of certiorari in this Court.

## REASONS FOR DENYING THE WRIT

### 1. The Second Circuit correctly decided that the State of New York did not discriminate against the petitioner in violation of section 504 of the Rehabilitation Act.

The petitioner argues at Point IA and Point III of the petition that New York State discriminates against employees hired pursuant to the State's § 55-b program because it places such employees in the noncompetitive class rather than in the competitive class. At the heart of her argument is that as a noncompetitive employee she was accorded only the displacement rights of other noncompetitive class employees and that when her position was eliminated because of OMRDD's budget shortfall, she was unable to displace any less senior competitive class employees and lost her job. She contends that this violates section 504 of the Rehabilitation Act because it "effectively results in the loss of meaningful seniority rights for disabled § 55-b

employees, vis-a-vis competitive employees in similar positions". Petition p 9.

Section 504 of the Rehabilitation Act of 1973 (29 USC § 794) provides:

> "No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 USC §706 (8)] of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *".

It is "clearly established law" that this statute simply assures handicapped individuals "evenhanded treatment" in relation to nonhandicapped individuals. *P.C. v McLaughlin*, 913 F2d 1033, 1041 (2d Cir 1990) (quoting *Traynor v Turnage*, 485 US 535, 548 [1988]); *see also*, *Doe v New York University*, 666 F2d 761, 775 (2d Cir 1981); *Alexander v Choate*, 469 US 287, 304 (1985) (citing *Southeastern Community College v Davis*, 442 US 397 [1979]).

The statute does not provide handicapped individuals with greater rights than others exclusively on the basis of their handicap. *United States v University Hospital, State University of New York at Stony Brook*, 729 F2d 144, 156 (2d Cir 1984); *Cushing v Moore*, 970 F2d 1103, 1109 (2d Cir 1992); *Gieseking v Schafer*, 672 F Supp 1249, 1263 (WD Mo 1987); *Flowers v Webb*, 575 F Supp 1450, 1465 (EDNY 1983).

To state a valid claim under section 504 of the Rehabilitation Act a plaintiff must prove:

> "(1) that she is a 'handicapped person' under the Act, (2) that she is 'otherwise qualified' for the position sought, (3) that she is being excluded from the position solely by reason of her handicap, and (4) that the position exists as part of a program or activity receiving Federal financial assistance."

*Doe, supra,* 666 F2d at 774. A plaintiff must satisfy all four of these prerequisites before further inquiry is made. *Id.*

Here, the lower courts concluded that while petitioner satisfied three of the statute's requirements, she could not succeed in her claim because she failed to demonstrate that she had been denied the same retention rights as other State workers "solely by reason of her handicap" (A7). The record bears this out.

It is undisputed that the petitioner voluntarily left a competitive civil service position to avail herself of the State's preferential employment opportunities offered to the disabled by Civil Service Law § 55-b (JA8-JA9). Moreover, the petitioner knew when she accepted her position with OMRDD that as a § 55-b position it would be reclassified in the noncompetitive class (A16). Thus, as correctly held by the courts below, petitioner's failure to attain competitive class status as a Senior Administrative Analyst, and the attendant displacement rights of a competitive class employee, was clearly not "solely by reason of her handicap", but was the direct result of her voluntary and informed

decision to seek a noncompetitive appointment through the State's § 55-b program.

It is true that the petitioner, as a noncompetitive § 55-b employee, enjoyed different retention rights under Civil Service Law § 80-a than are enjoyed by competitive class employees under Civil Service Law § 80. Pointedly, all noncompetitive class employees, disabled or non-disabled, have different civil service rights than competitive class employees, disabled or non-disabled, by virtue of having attained their position without having had to compete with others in a competitive civil service examination. *See*, Civil Service Law, Art 4. But quite contrary to her assertions (Petition, Point IB), petitioner's employment status as a noncompetitive employee was in no sense "inferior" to the employment status of any other State employee and she was clearly not obliged to waive any federally protected right when the position she sought was reclassified as noncompetitive in order to allow her to fill it without competitive testing pursuant to § 55-b. To illustrate this point, we note that while the petitioner's status as a noncompetitive class employee may have prevented her from displacing any less senior competitive class Senior Administrative Analysts following the elimination of her position, it also *protected* her during the ten years in which she held the position from being displaced by a more senior competitive class employee. She also enjoyed the not inconsiderable benefit of having obtained her position without competitive testing.

Moreover, it should be borne in mind that the petitioner was not *forced* by her handicap to obtain her position with OMRDD pursuant to § 55-b. The Civil Service Law did not *limit* her employment opportunities to those offered pursuant to that section. Disabled persons in New York are

eligible for and are encouraged to take all competitive examinations for which they are qualified. Indeed, the Civil Service law specifically provides for special accommodations to be made in the examination process to enable disabled applicants to compete in civil service examinations on an equal basis with non-disabled applicants. *See*, Civil Service Law § 55.

Had the petitioner taken such an accommodated competitive examination, and been successful, she would have been appointed to her position on the same basis as any other applicant and would have attained the same displacement rights afforded to all competitive class employees. However, the petitioner elected to avail herself of the advantages provided to the disabled by § 55-b and to avoid the State's statutory and constitutional competitive examination requirements. Under such circumstances the lower courts were clearly correct in rejecting her argument that she was discriminated against when, pursuant to the explicit direction of § 55-b, her position was placed in the noncompetitive class and she was accorded the retention rights due noncompetitive class employees.

The Rehabilitation Act cannot be used as a sword by handicapped individuals to obtain greater benefits than those to which they would otherwise be entitled. The Act simply guarantees "evenhanded treatment" for disabled individuals. *See*, *McLaughlin, supra*, 913 F2d at 1041; *see also*, *Alexander, supra*, 469 US at 304. Since the petitioner in this case was treated in the same manner as was as every other noncompetitive class employee, the petitioner was not the victim of discrimination. Accordingly, the Court of Appeals correctly ruled that no violation of the Act occurred.

**2. The Court of Appeals' decision does not conflict with any decisions of this Court or any other Circuit Court of Appeals.**

Contrary to petitioner's contentions at Point II of the petition, the decision of the Court of Appeals does not conflict with the decisions of the DC Circuit in the cases of *Shirey v Devine*, 670 F2d 1188 (DC Cir 1982), and *Allen v Heckler*, 780 F2d 64 (DC Cir 1985).

*Shirey* and *Allen* were brought under section 501 of the Rehabilitation Act which imposes greater obligations on the federal government than are imposed upon other employers by section 504 of the Act, with which this case is concerned.[4] As this Court explained in *Alexander v Choat*, *supra*, non-federal employers such as the State are not "required to make 'fundamental' or 'substantial' modifications to [their employment procedures to] accommodate the handicapped". 469 US at 300 (citing *Southeastern Community College v Davis*, *supra*, 442 US at 412-13). This obligation may be contrasted with the obligation imposed

[4]In *Shirey*, the plaintiff, who was deaf, lost his job with NASA after the agency announced a reduction in force. The plaintiff had originally obtained his position without taking a competitive civil service examination because the federal Civil Service Commission "excepted" the position from the normal competitive appointment process under a provision analogous to section 55-b. Like the petitioner here, Mr. Shirey was not permitted to bump other employees in the competitive class. 670 F2d at 1189-1190.

In *Allen* the plaintiffs were former mental patients who, because of their excepted status, were denied the right to an evidentiary hearing before an independent decisionmaker if they were disciplined or discharged, were denied the right to appeal to the Merit System Protection Board and were denied rights to "bump" other employees with less seniority in the event of a reduction in work force. 780 F2d at 66.

upon the federal government by section 501 of the Act, which is to establish affirmative action hiring plans for the handicapped. *Alexander*, *supra*, 469 US at 301 n 20 (section 504 "does not impose an 'affirmative-action obligation on all recipients of federal funds'"); *cf. Allen*, *supra*, 780 F2d at 69 (affirming district court's decision that non-competitive federal employment positions for handicapped individuals "does not provide adequate opportunities to [the handicapped] in violation of § 501 of the [Rehabilitation] Act").

As the district court in this case correctly pointed out, permitting the petitioner to take advantage of the bumping rights available to employees in the competitive class would constitute a "substantial" or "fundamental alteration" in the State's civil service program (A18). While the *Shirey* decision makes clear that modification of the federal program to permit excepted service employees to convert to competitive service status after two years on the job could, and in fact was, effected by executive order (*see*, 679 F2d at 1203), altering the State's civil service program would require an act of the Legislature.

The petitioner has failed to demonstrate in what manner the decision of the Court of Appeals conflicts with any decision of this Court or any other Circuit Court of Appeals, and has failed to come forward with any other good reason why review of the Court of Appeals' decision by this Court is warranted. The petition for certiorari should therefore be denied.

## CONCLUSION

**For the reasons stated, the petition for a writ of certiorari should be denied.**

Dated: Albany, New York
December 12, 1994

Respectfully submitted,

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